Filed 11/17/09 P. v. Moreno CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN MORENO, JR., Defendant and Appellant.	A123677 (Sonoma County Super. Ct. Nos. SCR-33621, MCR-431600)

Benjamin Moreno, Jr., (appellant) appeals from a judgment entered after he pled guilty to various offenses including attempted murder (Pen. Code,[1] §§ 187, 664). Appellant's counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and requests that we conduct an independent review of the record. Appellant was informed of his right to file a supplemental brief and did not file such a brief. Having independently reviewed the record, we conclude there are no issues that require further briefing, and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 2006, as part of an agreement to resolve two cases, appellant pled guilty to attempted murder of one victim (§§ 187, 664), assault of another victim with a deadly weapon and by means likely to cause great bodily injury (§ 245, subd. (a)(1)), and possession of heroin for sale (Health & Saf. Code, § 11351). He admitted that all three offenses were committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). The court also found true that appellant personally inflicted great bodily injury upon the victims

[1] All further statutory references are to the Penal Code unless otherwise stated.

of the attempted murder and assault (§ 12022.7, subd. (a)). The court's finding was based upon appellant's admitting the allegations without conceding the facts. (See *North Carolina v. Alford* (1970) 400 U.S. 25, 37; *People v. West* (1970) 3 Cal.3d 595, 603, 612-613.) Appellant stated he understood that pursuant to the plea agreement, "the range of sentencing could be between 12 years and 18 years . . . ." On February 13, 2007, the trial court sentenced appellant to a total aggregate term of 15 years in state prison. Appellant appealed the sentence and this court issued an opinion on March 25, 2008, affirming the convictions but vacating the sentence and remanding the matter to the trial court for resentencing (Case No. A117142).

On remand, the resentencing hearing was scheduled for September 15, 2008. On September 3, 2008, the attorney who represented appellant in his first appeal (prior appellate attorney) filed a motion to withdraw appellant's plea on the ground that the plea was not knowing, intelligent, and voluntary because appellant had not committed the crimes to which he pleaded and the enhancements were not true. On September 9, 2008, the attorney who represented appellant in the trial court before the first appeal was taken (trial attorney), filed a motion to continue the resentencing hearing on the ground that she "ha[d] been unable to adequately prepare for resentencing" "[d]ue to the fact of this motion [to withdraw the plea] . . . , the nature of the motion and the allegations underlying it," and because she had not yet received the transcript from the original sentencing hearing. The trial court denied the motion for a continuance but later continued the resentencing hearing and the hearing on the motion to withdraw the plea to October 20, 2008.[2]

On September 19, 2008, the prosecution filed an opposition to appellant's motion to withdraw his plea in which it argued, among other things, that the proper procedure by which to request to withdraw a plea was to file a petition for writ of habeas corpus. Appellant's prior appellate attorney filed a reply brief on October 8, 2008, then on October 10, 2008, filed a "petition for writ of habeas corpus and/or for writ of error coram nobis (motion to withdraw plea and admissions)," which repeated the same arguments as to

[2] The resentencing hearing ultimately took place on December 2, 2008.

why appellant should be allowed to withdraw his plea. Four days later, the prosecution filed a sur-reply to appellant's motion to withdraw his plea.

On October 14, 2008, appellant's prior appellate attorney made an ex parte request for an order shortening time to provide notice of a motion for a continuance and on October 15, 2008, requested an order to produce "several prisoners" appellant claimed "would be able and might be willing to testify on his behalf as to matters at issue in the [motion to withdraw the plea] and pending Petition for Writ of Habeas Corpus, etc." The trial court granted the request for an order shortening time. On October 17, 2008, appellant's prior appellate attorney filed a motion for a continuance of the October 20, 2008, hearing on the ground that he would "need some time to interview [witnesses]." On October 20, 2008, the trial court denied appellant's request for an order to produce witnesses and his motion for a continuance. The court also denied appellant's "petition for writ of habeas corpus and/or for writ of error coram-nobis (motion to [withdraw] plea [and] admissions[])]." On December 2, 2008, the trial court sentenced appellant to a total aggregate term of 13 years in state prison.

Appellant filed a notice of appeal and requested a certificate of probable cause on the ground that he "did not know" "that the prosecution had to prove the [various] acts, crimes, knowledge, and intents" "[f]or [him] to be guilty" and that had he known, he would not have pled guilty to the offenses or admitted the enhancements. The trial court denied appellant's request for a certificate of probable cause.

DISCUSSION

Appellant's counsel discovered no issues meriting argument but suggests we might consider the following three issues: (1) whether "[t]he trial court erred in denying appellant's request to withdraw his plea and admissions"; (2) whether "[t]he trial court erred in denying appellant's Petition for Writ of Habeas Corpus"; and (3) whether "[t]he trial court erred in denying appellant's motion to continue." We have reviewed the entire record and conclude there are no arguable issues that warrant further briefing.

Request to withdraw plea and admissions

"[S]ection 1237.5 provides that a defendant may not take an appeal from a judgment of conviction entered on a plea of guilty or nolo contendere unless he has filed in the

superior court a statement of certificate grounds, which go to the legality of the proceedings, including the validity of his plea, *and has obtained from the superior court a certificate of probable cause for the appeal*. [Citation.]" (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095, italics added.) An appellant's failure to obtain a certificate of probable cause means that "the Court of Appeal generally may not proceed to the merits of the appeal, but must order dismissal thereof . . . ." (*Id.* at p. 1096.) Specifically, where a defendant seeks to withdraw a plea based on the contention that it was not knowingly and intelligently entered, "appeal from the denial of such a motion is tantamount to an attack on the validity of the plea itself. An appellant must therefore comply with the requirements of section 1237.5 [Citation.]" (*People v. Osorio* (1987) 194 Cal.App.3d 183, 187.) As noted, appellant argued below that his plea was not knowing, intelligent, and voluntary. He was therefore required to, but did not, obtain a certificate of probable cause. We therefore need not, and will not, address whether the trial court erred in denying his motion to withdraw his plea.

Petition for writ of habeas corpus

We also decline to address whether "[t]he trial court erred in denying appellant's Petition for Writ of Habeas Corpus." An order denying a petition for writ of habeas corpus is not an appealable order. (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 983 ["Although the People may appeal the granting of a writ of habeas corpus, the detainee has no right to appeal its denial and must instead file a new habeas corpus petition in the reviewing court"].) We also note that although the denial of a petition for a writ of error coram nobis is appealable, "[*c*]*oram nobis* will not issue to vacate a plea of guilty solely on the ground that it was induced by misstatements of counsel [citation] or where the claim is that the defendant did not receive effective assistance from counsel [citations]." (*Id.* at pp. 982-983.) Here, appellant's request to withdraw his plea was based on the assertion that "he did not know," i.e., his attorney did not inform him, of the facts necessary for him to enter a knowing, intelligent, and voluntary plea. "Where[, as here,] *coram nobis* raises only such grounds, an appeal from the superior court's ruling may be dismissed as frivolous. [Citations.]" (*Id.* at p. 983.)

Motion to continue

A continuance will be granted for good cause (§ 1050, subd. (e)), and the trial court has broad discretion to grant or deny the request. (*People v. Grant* (1988) 45 Cal.3d 829, 844.) In determining whether there was error, "the appellate court looks to the circumstances of each case and to the reasons presented for the request." (*People v. Frye* (1998) 18 Cal.4th 894, 1013.) One factor to consider is whether a continuance would be useful. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) The trial court "must consider not only the benefit which the moving party anticipates, but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court, and, above all, whether substantial justice will be accomplished" by granting a continuance. (*People v. Laursen* (1972) 8 Cal.3d 192, 204.) The burden is on the defendant to establish error. (*People v. Beeler*, *supra*, 9 Cal.4th at p. 1003.) " '[A]n order of denial is seldom successfully attacked.' [Citation.]" (*Ibid.*)

The trial court did not abuse its discretion in denying appellant's motions to continue.[3] Appellant's trial attorney filed a motion to continue the resentencing hearing (originally scheduled for September 15, 2008) on the ground that she needed more time to prepare for the hearing. Although the trial court denied the motion, the resentencing hearing was nevertheless continued to October 20, 2008 and was ultimately not heard until December 2, 2008. There is nothing in the record indicating the attorney was not prepared for the resentencing hearing by the time the hearing actually took place, almost three months after the originally scheduled date. Thus, even if the trial court abused its discretion in denying the motion for a continuance, appellant cannot show he was prejudiced.

Appellant's prior appellate attorney filed a motion to continue the October 20, 2008, hearing on the ground that he needed time to interview potential witnesses, including the prisoners appellant claimed "would be able and might be willing to testify on his behalf as to matters at issue in the [motion to withdraw his plea] and pending Petition for Writ of Habeas Corpus, etc." In *People v. Emery* (2006) 140 Cal.App.4th 560, 562 (*Emery*), the

[3] It is unclear to which of the two motions to continue appellant's counsel is referring. We will address whether the denial of either of the motions was error.

defendant argued the trial court erred in denying his motion to continue a hearing so his attorney could investigate whether a ground existed for moving to withdraw his plea. *Emery* held: "[W]here an appellate challenge to the trial court's ruling is in substance a challenge to the validity of the defendant's plea, the appeal is subject to the requirements of . . . section 1237.5. [Citation.] The appeal cannot be brought unless the defendant has sought, and the trial court has issued, a certificate of probable cause . . . . Here, defendant's request for a continuance to file a motion to withdraw his no contest plea and admissions constituted, in substance, a challenge to their validity. Thus, this appeal is barred by his failure to obtain a certificate of probable cause." (*Ibid*.) Similarly, here, by challenging the trial court's denial of his motion to continue so that his attorney could interview potential witnesses, appellant is, in substance, challenging the validity of his plea. Consequently, a certificate of probable cause was required, and appellant's failure to obtain one is fatal to this appeal.

Appellant has not shown he received ineffective assistance of counsel. There was no sentencing error. There are no issues that require further briefing.

DISPOSITION

The judgment is affirmed.

_____
McGuiness, P.J.

We concur:

_____
Siggins, J.

_____
Jenkins, J.